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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 32

JAMES R. HOFFA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union files this brief with the consent of the parties because it believes that standards of fairness in the conduct of a criminal trial, embodied in the Fourth and Sixth Amendments, were violated by the government's use of the witness Edward Grady Partin.

Statement of the Case

Petitioner, with others, was convicted in Chattanooga of having tampered with jurors at an earlier trial held in Nashville (the so-called Test Fleet case) at which Hoffa was the only defendant.

At the Chattanooga trial Partin was one of the government's principal witnesses. It is not disputed that his testimony substantially contributed to the convictions. He there testified to conversations which he had overheard while in the company of Hoffa and some of his attorneys at the Nashville trial.

Partin, a Teamsters Union local official, attended the Test Fleet trial from its commencement until almost the end. He had been a close associate of Hoffa's and went to the Nashville trial on his own suggestion. But before he did that he had agreed to become an informer for the government.

Partin's contact with the government grew out of his detention in jail in Baton Rouge on a kidnapping charge and of his claim to have heard of a plot to murder the then Attorney General, Robert Kennedy. That led to talks in Atlanta with a Department of Justice attorney, Frank Grimsley, and to the latter's learning that Partin was going to be with Hoffa at Nashville. Grimsley arranged that Partin should report "any evidence of jury tampering or other illegal activities." In Nashville he was to contact another government representative, Walter Sheridan. This he did frequently during the trial. While Partin claimed he had not been paid by the government, it is undisputed that Sheridan issued authorizations for payments to Partin's wife aggregating $1,200 which were to be charged to the "confidential fund."

While in Nashville Partin met various lawyers representing Hoffa and was present while they discussed aspects of the case. Two of the lawyers, Buffalino and Maher, testified as to discussions with Partin, three others, Haggerty, Kossman, and Previsant as to his presence.

Maher referred to an incident on the *voir dire* when he got the impression that there had been a leak of information to the government because the prosecutor had objected to a question even before it had been asked. And Sheridan admitted that Partin had passed information to him that related to the case then being tried as well as to jury tampering and that he had passed on this information to the prosecutor and his assistants.

In sum, it seems clear that Partin, himself in trouble with the authorities, evidently believed he could obtain some benefit by working with them, and that when he let them know he was going to be with Hoffa at the Nashville trial the Department of Justice took the opportunity to have him keep them informed of what he learned. For this it would appear payments were later made to Partin's wife. While it may be true, as the prosecution at Chattanooga claimed, that the government had not sent Partin there in the first place, before he went he had agreed to become an informer. That circumstance differentiates this case from that of a person who is already in another's confidence advising the authorities that he has obtained evidence incriminating the other and then being asked to stay on.

ARGUMENT

I.

The use of Partin's testimony violated the right to counsel guaranteed by the Sixth Amendment.

It is clear that interference with an accused's right to counsel by spying on legal conferences vitiates a conviction: *Coplon* v. *United States,* 191 F. 2d 749 (2nd Cir. 1951); *Caldwell* v. *United States,* 205 F. 2d 879 (D. C. Cir. 1953). There the Court said at page 881 n. 10:

> "But here the surreptitious effort was not designed merely to get evidence, nor was it directed against the accused alone. Nor is the legal question here whether any such evidence was improperly admitted. Here the effort involved intrusion upon conferences, supposedly open only to the most loyal, between accused *and his counsel.*"

Closer is the recent case of *Massiah* v. *United States,* 377 U. S. 201. In that case the government induced a confederate to install a radio transmitter in the car of a man out on bail after indictment. This Court held that incriminating statements so overheard were inadmissible because made in the absence of counsel.

Pursuant to these authorities it follows that had Hoffa been convicted at Nashville a reversal would have followed.

Under the well settled principle that the government is not entitled to the benefit of evidence illegally obtained —the so-called "fruit of the poisonous tree," *Nardone* v. *United States,* 308 U. S. 338—it should follow that infor-

mation obtained as the result of the planting of Partin as a government informer should not be available at any subsequent trial. Any other result would permit the government to benefit by its own wrongdoing and would be contrary to the long line of search and seizure cases from *Weeks* v. *United States,* 232 U. S. 383, to *Aguilar* v. *Texas,* 378 U. S. 108, and *A Quantity of Books* v. *Kansas,* 378 U. S. 205. See Part II, *infra.*

At the trial the government cited *Lopez* v. *United States,* 373 U. S. 427, as sustaining its position. We submit that the case is not relevant. There an agent lawfully on premises entered into conversations with a defendant and was, of course, allowed to testify about them. The only issue was whether or not a tape recording which was simultaneously made could be introduced in evidence to corroborate him. Even so, Justices Douglas, Brennan, and Goldberg dissented from the affirmance.

Here, however, it was not the case of allowing a person to testify to incriminating statements made to a stranger. On the contrary, we have the government using someone known to be closely associated with a defendant to spy on him and his lawyers. We believe that the case falls within the principles laid down in *Coplon, Caldwell,* and *Massiah* rather than *Lopez* and that this Court should protect the right of a defendant to conduct his defense free from the presence of informers.

The Court below, 349 F. 2d 20, upheld the use of this testimony on the ground that the findings of the trial court were supported by substantial evidence. The trial court wrote two memoranda dealing with this subject (quoted in notes 11 and 12 at 349 F. 2d 35). In the first it found that there was no interference with the attorney-client

relationship and that Partin had not been placed in Nashville by the government but by Hoffa. When the Court's attention was called to the fact, as revealed by recorded telephone talks, that Partin had initiated the invitation the Court, in its second memorandum, stressed that Partin's presence at Nashville did not relate to the rights of the defendants at Chattanooga.

The Court of Appeals accepted this last argument and ruled (349 F. 2d at 37) that even if the testimony was tainted, it could not affect the later trial then under review. The Court relied on *Martin* v. *United States,* 335 F. 2d 945 (1964), and *United States* v. *Guerra,* 334 F. 2d 138 (1964). We submit that neither case is apposite. *Guerra* really has nothing to do with our case at all. In *Martin* the taint which resulted in reversal was wholly absent from the second trial. Here, however, the taint permeated the second trial since the government used the evidence it had improperly obtained during the course of the first trial.

II.

Partin's testimony should have been suppressed as a product of a violation of the Fourth Amendment.

During the Test Fleet trial, Partin frequented Hoffa's hotel quarters in the performance of instructions from the Department of Justice to "keep his eyes and ears open" and to report his observations to Sheridan, a Justice Department official. Partin's reports to Sheridan included accounts of conversations which he had with petitioners Hoffa and King in Hoffa's suite, as well as of discussions and events at which Partin was an onlooker. At the trial, Partin testified to incriminating admissions made by Hoffa

and King in these conversations. This testimony should have been suppressed because it was a product of a violation of the Fourth Amendment, which prohibits the government from violating "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1]

A. *The information to which Partin testified was obtained by a search of Hoffa's hotel quarters.*

By keeping "his eyes and ears open" in Hoffa's hotel suite for the purpose of reporting his observations, Partin was "searching" the suite, and what he saw and heard was obviously a product of the search. *Silverman* v. *United States,* 365 U. S. 505; *Lanza* v. *New York,* 370 U. S. 139; *Goldman* v. *United States,* 316 U. S. 129; *On Lee* v. *United States,* 343 U. S. 747; *Lopez* v. *United States,* 373 U. S. 427.

In these cases, the major controversy concerned the use of electronic equipment. But though amplification or recording is relevant to the reasonableness of a search, it is manifest that neither is essential to the making of an auditory search. As the Court said in *Wong Sun* v. *United States,* 371 U. S. 471, 485, "It follows from our holding in Silverman v. United States . . . that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'" The Court has thus repudiated the

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[1] The suppression rule applies not merely to tangible fruits of a Fourth Amendment violation, as in *Weeks* v. *United States,* 232 U. S. 383, but also to admissions (*Wong Sun* v. *United States,* 371 U. S. 471; *Silverman* v. *United States,* 365 U. S. 505; *Fahy* v. *Connecticut,* 375 U. S. 85, 91; *Nueslein* v. *District of Columbia,* 115 F. 2d 690 (D. C. Cir.)) and other intangible information. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *McGinnis* v. *United States,* 227 F. 2d 598 (1st Cir.).

view of *Olmstead* v. *United States,* 277 U. S. 438, 464, that there is no search or seizure when evidence is "secured by the use of the sense of hearing and that only." Moreover, in this case, Partin's testimony of face-to-face conversations with Hoffa and King narrated not merely what Partin had heard, but also what he had seen—the person speaking.

B. *Partin's search was not consented to.*

If Partin had been a concealed eavesdropper within the hotel suite, there can be no question but that his observations would have been the fruits of a search violative of the Fourth Amendment. *Silverman* v. *United States, supra.* In fact, Partin was present with Hoffa's acquiescence and was visible. Nonetheless, the requisite consent—in the Fourth Amendment sense—was absent.

First, Hoffa's consent to Partin's presence was not a consent to Partin's making a search, much less a search for incriminating evidence. A search consists not simply of observing, but of observing with a purpose. Some purposes may not involve application of the Fourth Amendment (cf. *Frank* v. *Maryland,* 359 U. S. 360), but the purpose of discovering evidence of crime obviously does. Accordingly, a consent to an entry for innocuous purposes, such as a tenant's consent to the landlord's entry to view waste (*Chapman* v. *United States,* 365 U. S. 610, 616) or a hotel roomer's consent to the entry of maids and repairmen (*Stoner* v. *California,* 376 U. S. 483, 489), is not a consent to an entry made to uncover evidence for the police.

Secondly, Hoffa's consent to Partin's entry did not waive his Fourth Amendment rights because the consent was procured by Partin's concealment of his role as a government spy and his passing himself off as a loyal friend. An entry

into private quarters procured on pretense of a social or business visit by one intending to conduct a search for the police is as unauthorized an intrusion for Fourth Amendment purposes as a forced entry. *Gouled* v. *United States*, 255 U. S. 298; *Fraternal Order of Eagles* v. *United States*, 57 F. 2d 93 (3rd Cir.). The same result is reached by applying the principle that a constitutional right is waived only by a choice made "intelligently and understandingly" (*Moore* v. *Michigan*, 355 U. S. 155, 161; *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 118), so as to represent "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464. Partin's false pose precluded any such waiver. Cf. *Spano* v. *New York*, 360 U. S. 315, excluding admissions obtained under a similar guise.

C. *The search was unreasonable.*

The determination of the reasonableness of a search must be made "from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment." *Ker* v. *California*, 374 U. S. 23, 33. No automatic formula is available in making this determination. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357; *United States* v. *Rabinowitz*, 339 U. S. 56, 63; *Harris* v. *United States*, 331 U. S. 145, 150.

The Court has decided two cases which, like this one, involved application of the Fourth Amendment to conversations between a suspect and one who had prearranged to disclose the conversation to police authorities.[2] *On Lee*

[2] Of course, no Fourth Amendment problem is posed by disclosure of a confidence by a recipient who was not acting for the police at the time he received the confidence.

v. *United States*, 343 U. S. 747;[3] *Lopez* v. *United States*, 373 U. S. 425. In each instance the Court found no Fourth Amendment violation.

In several respects, however, the "facts and circumstances" of this case differentiate it from *On Lee* and *Lopez* and make Partin's search unreasonable in the light of the Fourth Amendment's "fundamental criteria."

The place of search and mode of entry. In *On Lee*, the undercover man who engaged the suspect in conversation did so in a laundry open to the public. He needed to exercise no deception in order to obtain entrance, he was lawfully present, there was no trespass, and the entry *per se* was no intrusion into privacy, much less into the privacy of a home. See *On Lee*, 343 U. S. at 751-52, 766. Whatever fraud was practiced on On Lee by the informer's concealment of his role, that fraud was not a factor in procuring entry. All members of the public, including the police and their agents, were impliedly invited to the premises.

Leaving aside the fact that the informer in *On Lee* was wired for sound, his "search" did not violate the Fourth Amendment because it was not conducted on closed premises. The situation was no different than a police search made in an open field owned by the suspect, and such a search is not condemned by the Fourth Amendment. *Hester* v. *United States*, 265 U. S. 57.

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[3] In *On Lee*, the Court divided on the admissibility of testimony by a witness who had heard by the use of electronic equipment a conversation between a suspect and an undercover man wired to transmit the conversation. For present purposes, the significant aspect of the case is that both the majority and the minority agreed that the undercover man could have testified to the conversation which he had heard without the aid of electronics. See 343 U.S. at 751-53, 766.

In the present case, Partin gained access to residential quarters only by concealing his role as a spy and misrepresenting himself as a friend and associate. This case, therefore, is not like *On Lee,* but more like *Gouled* v. *United States,* 255 U. S. 298. In that case, an army intelligence agent, who was a business acquaintance of Gouled, obtained entry into Gouled's private office under pretext of making a friendly call, searched the office, and took private papers. The Court stated (*Id.* at 306):

> "... whether entrance to the home or office of a person suspected of a crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment. . . . "

As in *Gouled,* Partin obtained entrance to Hoffa's private living quarters by a pretext, and there, as we have seen, he conducted a search unbeknownst to Hoffa.

It was settled by *Gouled* "that a lawful entry is the indispensable predicate of a reasonable search," and that a pretext entry into a private place is unlawful for Fourth Amendment purposes. *Ker* v. *California,* 374 U. S. 23, 53. Accordingly, in *Fraternal Order of Eagles* v. *United States,* 57 F. 2d 93 (3rd Cir.), the Court suppressed visual observations made by government agents inside a private club to which they had gained entrance by passing themselves off as club members.

The difference in treatment of an entry into open premises, as in *On Lee*, and one into a private place, as here and in *Fraternal Order*, conforms to the historic function of the Fourth Amendment as an implementation of the maxim that a man's home is his castle. The "basic premises of the prohibition against searches" was "the common-law right of a man to privacy in his home." *Frank* v. *Maryland*, 359 U. S. 360, 377 (dissenting opinion); and see *Miller* v. *United States*, 357 U. S. 301, 307, 313; *Weeks* v. *United States*, 232 U. S. 383, 390. And, "It is clear that at common law the sanctity of an individual's home received greater protection than the privacy of his person." Beaney, The Constitutional Right to Privacy in the Supreme Court, 1962 Sup. Ct. Rev. 212, 235. Accordingly, invasion of a home "by even a fraction of an inch" makes a constitutional difference. *Silverman* v. *United States*, 365 U. S. 505, 512.

Partin's entrance was, therefore, an intrusion condemned by the Fourth Amendment, so that his search lacked "the indispensable predicate of a reasonable search."

This conclusion is not affected by the fact that in *Lopez* the conversation between suspect and government agent, held admissible, took place in the former's private office. For the missing element in *Lopez* was an entry obtained by deception. The entrant in *Lopez* had made known his identity as a government employee; he was present on disclosed government business with the suspect's consent, and he "was not guilty of an unlawful invasion of [the] office simply because his apparent willingness to accept a bribe was not real." 373 U. S. at 438.

Time of search. The most obnoxious aspect of Partin's search was that it took place while petitioners were on trial

for their liberty and spied on the councils of the defense. This fact alone makes *On Lee* and *Lopez* irrelevant and the search here unreasonable. As stated in *Caldwell* v. *United States,* 205 F. 2d 879, 881 n. 10 (D. C. Cir.), *On Lee* does not apply to an "intrusion upon conferences, supposedly open only to the most loyal, between accused *and his counsel*" (emphasis in original). See Part I, *supra.*

Duration of search. Partin's search involved not a single conversation, as in *On Lee* and *Lopez,* but a haunting of Hoffa's premises for long hours during many days. A search of such long duration is clearly an aggravated breach of the privacy safeguarded by the First Amendment.

Absence of probable cause. A warrantless search may be violative of the Fourth Amendment even if there is probable cause to suspect the commission of a crime or the presence of contraband on the premises. But, as appears from the Amendment's requirement that "no Warrants shall issue, but upon probable cause," certainly the existence of probable cause is a sine qua non of a legal search. Cf. *Brinegar* v. *United States,* 338 U. S. 160, 164; *Carroll* v. *United States,* 267 U. S. 132; *Nueslein* v. *District of Columbia,* 115 F. 2d 690, 693-94 (D. C. Cir.). Here, in contrast to the situation in *On Lee* and *Lopez,* there was no probable cause for a search of Hoffa's residence. To the contrary, Partin was instructed to call Sheridan if he saw evidence of *any* illegal activities. Thus Partin's search was an exploratory search, and all such searches are prohibited by the Fourth Amendment. *United States* v. *Lefkowitz,* 285 U. S. 452, 466; *United States* v. *Rabinowitz,* 339 U. S. 56, 62.

Under our constitutional system, individuals have a right to be free from police surveillance in the absence of prob-

able cause to believe that they are involved in criminal activities. Cf. *Local 309* v. *Gates,* 75 F. Supp. 620 (N. D. Ind.); *Hale* v. *Burns,* 101 App. Div. 101, 91 N. Y. Supp. 929. It is the hallmark of a police state to place individuals under surveillance merely because they have aroused the enmity of the authorities. It was stated in 2 May, Constitutional History of England 275 (1863):

> "Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators—who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency."

Because Partin's search was an espionage operation conducted without probable cause, it was an unreasonable search under the Fourth Amendment.

Assumption of risk. We have now reviewed the circumstances which in our view made Partin's search incompatible with the Fourth Amendment. There remain for discussion certain passages in the *Lopez* opinions.

Lopez had offered a bribe to an internal revenue agent (Davis), who recorded the conversation by a pocket wire recorder. At the trial, the incriminating conversation was

established both by Davis' testimony and by the recording. The Court, holding both types of evidence admissible over Fourth Amendment objections, stated:

> "The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication." (373 U. S. at 438.)

> "We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." (*Id.* at 439.)

Justice Brennan, dissenting (with Justices Douglas and Goldberg), disagreed as to the admission of the recording, but not as to the admission of the live testimony. He stated (*Id.* at 450):

> "That is not to say that all communications are privileged. On Lee assumed the risk that his acquaintance would divulge their conversation; Lopez assumed the same risks vis-à-vis Davis. The risk inheres in all communications which are not in the sight of the law privileged. It is not an undue risk to ask persons to assume, for it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted. But the risk which both On Lee and today's decision impose is of a different order. It is the risk that third parties, whether mechanical auditors like the Minifon or human transcribers of

> mechanical transmissions as in On Lee—third parties who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place—may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one's mouth shut on all occasions."

Whatever may be said as to the soundness of the holdings in *Lopez,* it is hard to see a theoretical basis for the statements made in the passages quoted. Nothing in the Fourth Amendment excludes from its protection "unprivileged" communications or implies an assumption of risk doctrine which makes the Amendment unavailable to persons of trusting disposition. The illegality of a warrantless entry into a home is not cured by the fact that the householder left his door unlocked or even open. *Nueslein* v. *District of Columbia,* 115 F. 2d 690, 691 (D. C. Cir.). Considering what is known of police practices, only the naive would fail to suspect that an illegal gambling establishment might be under electronic surveillance by the police. Yet the Court invalidated the electronic search in *Silverman* v. *United States,* 365 U. S. 505, without even considering whether the gamblers involved had assumed the risk of such surveillance.

Lopez does not establish that face-to-face conversations are *ipso facto* unprotected by the Fourth Amendment. This is shown by *Wong Sun* v. *United States,* 371 U. S. 471; *Fahy* v. *Connecticut,* 375 U. S. 85; and *Nueslein* v. *District of Columbia, supra,* all of which excluded as fruits of Fourth Amendment violations verbal statements made to the police.

The risk-assumption allusions in *Lopez* can mean no more than that risk-assumption is a factor, we think a dubious one, in determining the reasonableness of a search. As indicated by the passage quoted above from Justice Brennan's dissent, this factor, if it exists, involves not what risks a speaker can reasonably anticipate, but what risks he can be required to assume without doing violence to the policies of the Fourth Amendment.

Partin's search offended the Fourth Amendment because it occurred in a residence, entry into which was obtained by false pretenses; because it intruded upon councils of the defense while petitioners were on trial, was of extended duration, was made without probable cause, and was conducted by an individual of guaranteed unreliability. To make Hoffa assume the risk that so abhorrent a search would be made by the government of a free country would sacrifice the Fourth Amendment.

CONCLUSION

We respectfully submit that the conviction should be reversed.

Respectfully submitted,

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